85-326

No. .....

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANNE M. GOLDBERG, DANIEL GARNER, GERALD GARNER, DANIEL GARNER, and HARVEY GARNER, as Trustees of G FAMILY TRUST #1, GERALD J. GARNER and HARVEY GARNER, as Trustees of G FAMILY TRUST #2, GERALD J. GARNER and DANIEL GARNER as Trustees of G FAMILY TRUST #3, DANIEL GARNER and HARVEY GARNER, as Trustees of G FAMILY TRUST #11, GERALD J. GARNER and HARVEY GARNER, as Trustees of G FAMILY TRUST #12, LOUIS GOLDBERG and others similarly situated,

Petitioners,

v.

UNITED PARCEL SERVICE OF AMERICA, INC., FIDELITY UNION BANK, LARRY P. BREAKIRON, CHARLES R. BUCKRIDGE, WALTER E. DANIELEWSKI, CARL KAYSEN, GEORGE C. LAMB, JR., DONALD W. LAYDEN, GARY E. MACDOUGAL, KENT C. NELSON, PAUL OBERKOTTER, JOHN W. ROGERS, GEORGE P. WILLIAMS, III,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 26, 1985

16 pp

QUESTIONS PRESENTED

1. Whether a restriction imposed by the Respondents upon the Petitioners as employees and holders of the shares of United Parcel Service of America, Inc. (UPS) to which they did not agree or vote upon, mandating a compulsory sale of such shares to UPS at a value fixed by its Board of Directors, is a valid restriction under the Delaware Corporation Law prohibiting such restrictions without agreement or vote and in face of a provision in the Certificate of Incorporation allowing the free sale of such shares at market value subject, however, to the first option of refusal on behalf of the Respondent, UPS?

2. Whether it is a deceptive practice under the Securities Act of 1933 and

1934 for the Respondent, UPS, and the remaining respondents, its Board of Directors, who were in complete control of the operation of the closed corporation known as UPS, to impose upon its shareholder-employees, the obligation, in violation of its Certificate of Incorporation and without its amendment thereto, to sell their shares back to UPS at a value fixed by the Board of Directors?

3. Whether summary judgment was properly granted dismissing the Petitioners' amended complaint below in view of the material issues of fact inherent in this case involving the Petitioner, Louis Goldberg, as an employee-shareholder of UPS, and the Respondents, UPS and its Board of Directors, in failing to amend its Certificate of Incorporation and in

using the employer-employee relation to impose unlawful and invalid restrictions upon the acquisition and holdings by its employees of its shares?

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1985

ANNE M. GOLDBERG, et al.,

Petitioners,

v.

UNITED PARCEL SERVICE OF AMERICA, INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Anne M. Goldberg (GOLDBERG), an individual hereinafter referred to as "Petitioners", pray that a Writ of Certiorari issue to review the

judgment and opinion of the United States Court of Appeals for the Second Circuit in the above entitled case. The respondents herein are United Parcel Service of America, Inc. (UPS) and each of its Board of Directors, with the exception of George P. Williams, III, who is now deceased and whose estate has not been substituted into the caption. In addition thereto, a respondent is Fidelity Union Bank who is the Trustee of the shares concerning the dispute in this action. Each of the respondents were named and served as defendants in the action below.

The Opinion and Judgment of the Court of Appeals for the Second Circuit, not published, appears in Appendix B of this Petition.

The Opinion of the District Court

dated January 7, 1985 appears in Appendix A of this Petition.

JURISDICTION

The Judgment of the Court of Appeals for the Second Circuit was entered on May 30, 1985. This Petition for Certiorari was filed within 90 days of said date.

The jurisdiction of this Court is found at 28 U.S.C. 1254(1).

STATUTES WHICH THE CASE INVOLVES

Section 10 of the Securities Exchange Act of 1934 (15 U.S.C. Section 78j); Rule 10B-5 (17 C.F.R. Section 240.10B-5) (1976); and Section 202(b) of the General Corporation Law of the

State of Delaware, all of which sections are set forth in Appendix I hereof.

STATEMENT OF THE CASE

This case concerns itself with the issuance of shares by the respondent, UPS, to the petitioners and more particularly Louis Goldberg, as an employee of the respondent, UPS, and the method of acquisition and form of acquisition of those shares by Louis Goldberg and his successors and assigns, all of whom comprise the petitioners herein.

An examination of the affidavit in support of the motion for summary judgment made by the respondents below, which affidavit was made by its Secretary, J. Robert Peterson, is part of this Petition and found at Appendix E. That affidavit

sets forth the chronology of the issuance of shares of the respondent, UPS, and we extrapolate therefrom.

(a) UPS was formed in 1907;

(b) In consideration of its concern for success and to reward its executive personnel, it adopted, in 1954, several methods to enable such personnel to own stock in UPS;

(c) In 1954, UPS adopted the UPS Managers Incentive Plan (The PLAN) thus enabling ownership of UPS by these employees; the employees who were eligible for the receipt of such stock were UPS operating center supervisors, such as the petitioner, Louis Goldberg, who, along with his family, comprise the petitioners herein.

(d) In connection with such Plan,

UPS devised the UPS Managers STock Trust (TRUST), the provisions of which were applicable to every supervisor as well as the "Chairman of the Board";

(e) The Trust enabled UPS to retain the stock within its treasury and to enable it to have a circulation of stock for its eligible employees and not for the public; the eligible employee must agree to the terms of the UPS Managers Stock Trust Agreement (The TRUST AGREEMENT) and thus deposit his shares in that trust;

(f) The rights of the holders of such stock are not assignable and any assignment permits UPS to re-purchase the member's shares at such value fixed by the Board of Directors; however, UPS permits transfers to immediate members of

the holder's family;

(g) There are restrictions involving transfer of the stock held in the Trust consisting of the following:

(i) The holder may request withdrawal of his shares and UPS becomes entitled to purchase such shares at their fair market value as fixed by the Board of Directors.

(ii) No transfer of the stock can be effectuated other than within the provisions of the Trust Agreement.

(h) There are additional provisions concerning retirement and the ability of UPS to purchase a retiree's holdings after the thirteenth year following his retirement;

(i) These provisions implement

the provisions of the Certificate of Incorporation of UPS, in that the UPS Certificate of Incorporation provides that none of the outstanding shares of UPS may be transferred, except by bona fide gift or inheritance, unless the shares are first offered for sale to UPS, at the same price and upon the same terms as are offered to the proposed transferee. (Paragraph 18, Appendix E). The rights of repurchase set forth in the Trust Agreement implement the restrictions on transfer of stock contained in the UPS Certificate of Incorporation. (Paragraph 19, Appendix E) [emphasis supplied].

(j) Louis Goldberg, a former employee of UPS, did retire on July 24, 1978;

(k) As part of its plan for its

600 share owners holding approximately 2,171,000 shares, UPS has, between May 24, 1983 and August 24, 1983, exercised its option to purchase the shares held by the Goldberg family. On August 24, 1983, it purchased such shares pursuant to the option set forth in the Trust Agreement at the price of $11.00 per share, as set by the Board of Directors at its May 1983 quarterly meeting. The option was exercised by the Board on August 24, 1983 at $11.00 per share and on August 26, 1983, it fixed the new market value of UPS at $13.50 per share, which is $2.50 more than what it paid for the stock of the petitioners.

In opposition thereto, the petitioners as plaintiffs below interposed an answering affidavit which is part of this

Petition as Exhibit F. In that affidavit it is readily seen that shares held by employees of respondent, UPS, prior to the promulgation of the Plan were freely alienable shares pursuant to the terms and provisions of the Certificate of Incorporation. It was only after the imposition of the restriction of the Plan and the Trust Agreement that employees were unable to offer their shares in the marketplace. However, they had to offer their shares back to the Corporation at values fixed by the Board of Directors, who are named herein as respondents.

The essence of the case is whether the Certificate of Incorporation, being a binding contract between the respondent, UPS, and its shareholder-employee, was usurped and violated by the imposition

of restrictions in violation of Section 202(b) of the Delaware Corporation Law. The position of the Courts below was grounded in the fact that Louis Goldberg, as the employee of UPS, assented to these restrictions within the purview of Section 202(b) and should not now be heard to complain of the burden of such restrictions. There is nothing in the record to support that finding.

In a colloquy between counsel for the respondents and United States District Judge Platt, it was stated that Louis Goldberg executed agreements to the terms and provisions of the Trust Agreement. Counsel for the respondents was then called upon to produce such documents and indicated to the Court that he would produce such documents. To date the only document produced is annexed

hereto as Exhibit H, which is the Trust Agreement executed by Louis Goldberg without date and in blank. This is the only document before Judge Platt and before the United States Court of Appeals for the Second Circuit. Notwithstanding this glaring omission, summary judgment was granted to the respondents as the defendants below.

The gist of the District Court Opinion is based only upon the fact that Mr. Goldberg agreed to the restrictions. The Second Circuit went further in affirming that finding by making an additional finding that the claims of the petitioners as plaintiffs were barred by the appropriate statute of limitations. We shall deal with that in our explanation concerning why this Court should grant this Peti-

tion. At this juncture of the case, summary judgment would be grounded pursuant to F.R.Civ.P. 56, in that there were no material issues of fact and that the petitioners as plaintiffs below should be denied their day in court to test the validity of the restrictions imposed by these controlling directors. There is nothing in the record before Judge Platt or the Second Circuit Court of Appeals which supports the notion or contention that Louis Goldberg executed any agreement to these restrictions.

Simply put, we have here a Certificate of Incorporation, filed in 1930, restated in 1970, which permits shareholder-employees to sell their shares in the marketplace subject to the first refusal of the respondent, UPS, to purchase

such shares at the market value (emphasis supplied). Thus, from 1930 to 1970 and even to the present, the Certificate of Incorporation permits free alienability of the shares held by the petitioners. Comes UPS now in 1954 to promulgate the Trust Agreement and the Plan. There is no amendment to the Certificate of Incorporation. There is no vote of the shareholder-employees to amend the Certificate of Incorporation. There is no consent of the shareholder-employees to permit the restrictions. It is a resolution of the Board of Directors to promulgate the Plan and the Trust Agreement.

There is further no proof in the record that Louis Goldberg as the shareholder-employee was aware of the provisions of the Certificate of Incorporation

which attached to his holdings and permitted their unfettered transfer. As shall be seen later on in this Petition, the agreement is one of adhesion and is not one between a sophisticated investor and a corporation. It is rather one between a subjugated employee who was told to "take it or leave it" in violation of the protection afforded him in the corporate charter.

Finally, the value attributed to the shares of the respondent, UPS, is that value fixed by its own Board of Directors. Thus the true market value of the shares held by the employee-shareholders is never subject to the marketplace as contemplated by the corporate charter. Instead the rights afforded these shareholder-employees by the corporate charter

has been completely diluted by the imposition of the restrictions of the Trust Agreement which the respondent, UPS, maintains was executed by the petitioner, Louis Goldberg. However, there is nothing before either Court below which UPS can show which says that Louis Goldberg agreed to these restrictions each and every time shares were issued to him. This omission stands as a beacon since counsel for UPS assured the Court below that documents attesting to that fact would be produced. To date they have not been so produced.

REASONS FOR GRANTING THE PETITION

This Petition should be granted based upon Point 1(a) of Rule 17 of the Rules of this Court and more particularly

to sanction a departure of a lower Court and to exercise this Court's supervision. Furthermore, pursuant to Point 1(c), we have an important question of Federal Law decided by a Federal Court of Appeals which point has received attention from this Court however, no settlement of the issue.

Those reasons lie in the fact that summary judgment was granted dismissing the plaintiffs' case in spite of the existence of material issues of fact, consisting of whether the petitioners as plaintiffs below executed assents and agreed to the imposition of restrictions on their share holdings in contravention of the corporate charter which was in existence since 1930 and which governed their acquisition of such shares. Fur-

thermore, the important question is whether the failure of the respondent, UPS, and its Board of Directors, the controlling arm of the corporation, to make known to these petitioners as plaintiffs below of their unfettered right to transfer such shares in a fashion designed to give them actual notice thereof is a deceptive practice and originating in deception, its nature can never change and the limitations of time tolled during such period.

The affidavits and exhibits, or lack of them, as maintained by the petitioners, submitted or not submitted by the parties, should be viewed in the light most favorable to the petitioners. United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d

176 (1962), Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962).

The words of Chief Justice Taft are appropriate "[I]t is very important that we be consistent in not granting the Writ of Certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." Layne & Bowler Corp. v. Weston Well Works, Inc. (1923), 43 S.Ct. 422, 423, 261 U.S. 387, 393, 67 L.Ed. 712.

We will show in this Petition that the principles are not only important

to the parties but of utmost concern to the public and to that section thereof who are employees of corporations from which they receive shares of stock and how once acquired, the terms of that acquisition cannot be changed to their derogation.

The first aspect of the Court of Appeals treatment of the Opinion below is based upon the valid corporate purpose of the Trust Agreement. The valid corporate purpose was not treated below and is not sought to be treated here since it does not play a part in the sinew of the corporate structure of UPS. It is rather the affirmance by the Court of Appeals that when Louis Goldberg "received or purchased the stock of the respondent UPS, he signed a trust deposit agreement

stating, 'I have read the agreement..... and agree to its terms.'" That Louis Goldberg did not execute a Trust Agreement assenting to the issuance of any of the shares in his possession is the nub of this case. The document annexed hereto as Appendix H is a blind and blank document. It bears Mr. Goldberg's signature, but is without date.

Is the respondent, UPS, maintaining that this document is the primogenitor of all of the holdings of Louis Goldberg rather than the provisions of the Certificate of Incorporation permitting unfettered transfer? If they are saying that and that is all we have before us and that is all either Court below had before it, then surely this Court must intervene in the interest of its judicial supervi-

sion and interest of resolving a very important concept of law, namely the ownership of property by individuals. Surely it is important to these litigants and the public that once receiving shares of stock the terms of such acquisition cannot be dictated to them if the initial controlling right was conferred upon them by a corporate charter permitting them some rights which have now been taken away with their alleged consent. The analogy can well be drawn to the taking by government of property without due process. That is a taking which is unconstitutional. The respondent not being part of government, however, must still answer to the petitioners in a Court of law to its taking of property without due process when there is blatant

provision for the terms of holdings by these petitioners and those terms are revoked by the respondents, without authority.

A prior Federal Court had occasion to consider the purpose of Section 202 of the Delaware Corporation Law. In Joseph E. Seagram & Sons v. Conoco, Inc. (D.Delaware 1981) 519 F.Supp. 506, Chief Judge Latchum found that Section 202(b) prohibited any restriction upon the issuance of corporate stock to aliens of the United States of America unless the holders of the Certificates of Stock assented to that restriction. It is interesting in that case that the Court cites B & H Warehouse Co., Inc. v. Atlas Van Lines, Inc., 490 F.2d 818 (5th Cir. 1974) because that case is central to our conten-

tions. We shall discuss that case hereafter in our Petition.

Another interesting aspect of the Seagram decision is that the Court discusses the fact that under Delaware Law, "a Certificate of Stock is only evidence of share ownership and is not the stock itself." 519 F.Supp. 513.

The reason for the Seagram rule is found in the very prohibition sought to be imposed upon the ownership of stock under 202(b) of the Delaware Corporation Law. The Court stated

> "The Court further believes that plaintiffs' construction of Section 202(b) is the only logical interpretation which can be drawn from the language of the statute. Adoption of Conoco's position would produce the incongruous result of allowing the Board of Directors unilaterally to impose stock transfer restrictions, which might be of significant economic consequence, on existing shares without the consent of the corpora-

> tion's shareholders. Under Conoco's interpretation of 202(b), once a shareholder decides to sell his shares and the purchaser tenders the unrestricted certificates to the corporation for transfer of title and recordation, whether either shareholder or purchaser affirmatively consents or not, the corporation will affix a legend to the certificate which will bind the purchaser to the terms of the alien ownership restriction....., under either of these scenarios, restrictions which could involve serious limitations on the free alienation of stock and could severely circumscribe an existing shareholder's market for selling Conoco stock would be imposed without the consent of the shareholder."

The Court thereafter goes on to discuss how important and critical is consent of shareholders to such restrictions upon those shareholders who have received stock prior to the adoption of such restrictions. The exact case exists in the case at bar.

In Santa Fe Industries, Inc. v. Green, 430 U.S. 467, 97 S.Ct. 1292, 51

L.Ed.2d 480 (1977), Mr. Justice White stated that the Petition for Certiorari was granted because of the importance of the issue involved to the administration of the Federal Securities Laws. See 429 U.S. 814, 97 S.Ct. 54, 50 L.Ed.2d 74 (1976). Our discussion concerning the importance of the issue is in the same realm. In Santa Fe, the rule was announced that "[t]he claim of fraud and fiduciary breach in this complaint states a cause of action on any part of rule 10b-5 only if the conduct alleged can be fairly viewed as 'manipulative or deceptive' within the meaning of the statute."

Examples of such deception were set forth in Note 15 of the Opinion, 97 S.Ct. 1301.

It is the law that "Rule 10-b

must be read flexibly, not technically and restrictively and that the statute provides a cause of action for any plaintiff who 'suffers an injury as a result of deceptive practices touching its sale (or purchase) of securities.....'" Superintendent of Insurance v. Bankers Life & Cas. Co., 404 U.S. 6, 12-13, 92 S.Ct. 165, 169, 30 L.Ed.2d 128 (1971).

The essence of Santa Fe and its progeny as well as those cases decided after Superintendent of Insurance is that there is a duty of disclosure and fair dealing on behalf of a Board of Directors with its shareholders. Whether the issue be one of tender offers, merger or other corporate activity, there is still that rule of fair dealing. That is not to say, as the Court proscribed, that any breach

of fiduciary duty is actionable under Rule 10-b. It is rather that the essence of disclosure which guides the acquisition of shares whether by purchase or grants, as in this case, is at the heart of Securities Regulation.

In this case, we have a situation involving the interpretation of a provision of the Delaware Corporation Law and this Court has said that we look to the law of the place of incorporation which controls the ownership of shares of stock of a corporation. First National Bank v. Banco Para El Comercio Exterior De Cuba (1983) 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46.

Thus the Seagram opinion, supra, is applicable to the facts in this case as the highest court of the State of

Delaware decided the inviolability of Section 202(b) of the Delaware Corporation Law.

This Court also recognized the importance of Section 10-b to the statutory scheme in granting certiorari and deciding that the Section 10-b causes of action are in addition to those statute schemes for the protection of shareholders. This approach was made in Herman and Maclean v. Huddleston, 459 U.S. 375, 103 S.Ct. 683, 74 L.Ed. 548 (1983).

Furthermore, the Court established the evidentiary rule of proof for a plaintiff under Section 10b as the preponderance of the evidence standard and not a clear and convincing standard. This is an indication of this Court's approach to the essence of securities

fraud cases. The petitioners herein should have the opportunity of proving their case at trial. They should not be ousted from their day in court especially when material issues of fact prevail as were present before the Courts below.

The Ryan case cited in the opinion of the Court of Appeals does not apply to the facts in this case. Ryan does not apply as well as other cases cited therein. In Ryan, there was a stock restriction to which Ryan, a Vice President-Director of the corporation, consented and under which he obtained his shares. That is not the case here. There is nothing in Ryan concerning the acquisition of shares pursuant to a corporate charter provision and then assent to subsequent stock restriction by the

shareholder. That is absent in this case. The failure of respondents to show a document signed by Louis Goldberg and say that is the prevailing document, is dispositive. It shows the existence of issues of fact which have to be resolved at a trial.

In the B & H case, supra, the Fifth Circuit held that a transfer restriction which had not been included in either the corporation's articles of incorporation or by-laws and had not been assented to by the plaintiff-stockholder could not be enforced against the stockholder. That is the essence of our position. We are stating that given the corporate charter and its right of alienation, there should be no summary judgment. Furthermore, the question of assent by a

stockholder such as Louis Goldberg, not being conclusively proved in the Courts below, is a critical issue of fact in this case.

It is respectfully submitted that the Court of Appeals grafted an additional reason for its affirmance and it relief upon the limitation of time which shall be addressed hereafter in this Petition. The limitation of time approach was not stated in the District Court Opinion. The District Court relied solely upon the decisions of Ryan and its progeny concerning the consent of a shareholder to restrictions. We do not have that in this case. There is no proof anywhere in the record of consent by Louis Goldberg to restrictions upon his shareholdings in violation of the Certificate of Incorpo-

ration. In B & H Warehouse, the restriction was imposed prior to the enactment of Section 202(b). Section 202(b) was enacted in 1967. The Trust Agreement was enacted in 1954. Certainly any restrictions imposed by the Trust Agreement prior to the enactment of Section 202(b) are unlawful. Any stock issued during that period of time is subject to the Certificate of Incorporation. Any stock issued after 1967 would be governed by the Certificate of Incorporation subject to the Trust Agreement assuming it was executed by Mr. Goldberg. These are the material issues of fact inherent in this case of which the Court below would not permit proof at a trial in violation of the plaintiffs' rights.

The Second Circuit relies upon

the alleged issuance of a prospectus to the plaintiffs-shareholders every year since 1973. The Court cites Buder v. Merrill Lynch, Pierce, Fenner & Smith, 644 F.2d 690, 693 (8th Cir. 1981) in support of its finding.

It is important to note that there is no proof that the prospectus referred to in its opinion was received by the shareholder-employees. The important material issue is whether knowledge was ever brought home to the type of shareholder we have in this case. He is an employee, not an investor. As indicated in the answering affidavit in Appendix E, the holding of the shares of UPS were intertwined with employment. We have in this situation a prima facie showing that UPS and its Board of Directors had full

complete and exclusive control. See National Railways of Central America v. United Fruit Co., 373 F.2d 408, 414 (2nd Cir.), cert. denied 3897 U.S. 921, 87 S.Ct. 20, 31, 18 L.Ed.2d 1975 (1967). In such instances, there is a tolling of the statute of limitations as to these controlled wrongdoers during the period of their domination and control. Armstrong v. McAlpin, 699 F.2d 79, 87 (2nd Cir. 1983).

There is little doubt that the Board of Directors of respondent, UPS, throughout its years of formation, has controlled the operations of this corporation especially insofar as issuance of shares are concerned. They are the sole arbiters of the value of the stock of the corporation. Being the sole arbiters of

the value of the stock of the corporation as set forth in the Plan and Trust Agreement, the control is unlimited. Thus they control the amount of shares held by its employees and the amount of shares issued to the employees. To ignore the fact that Louis Goldberg was an employee of UPS and how that fact affects the issues in this case is to ignore the reality of the case. We do not have an investor in a Board Room of a recognized brokerage firm. We have an employee working for 50 years for one corporation and receiving its munificence in the form of stock. The stock is allowed transfer pursuant to a Certificate of Incorporation. Any restrictions imposed upon that transfer must be shown to have been lawfully made and agreed to by the share-

holder. That is the issue of fact in this case and that is why summary judgment was improperly granted. The essence of National Railways of Central America lies in the following language of Judge Friendly: "This principle must mean at least that once the facts given rise to possible liability unknown, the plaintiff must effectively negate the possibility that an informed stockholder or director could have induced the corporation to sue." 373 F.2d 415.

Whether Louis Goldberg as one of the petitioners herein was an informed stockholder at the time of the imposition of the restrictions is central to deciding the question of assent to such restrictions. These are areas of material fsct questions to be decided at trial.

An excellent discussion of the rule is found in Currie v. Cayman Resources Corp., 595 F.Supp. 1364 (N.D. Georgia 1984), wherein it is stated:

> "Although the limitations period to be applied is a matter of state law, the time at which the action accrues and the statute begins to run is a question of federal law. Kennedy 710 F.2d at 716. The period of limitations applicable to implied causes of action under rule 10b-5 begins to run at the point when the plaintiff had actual knowledge of the alleged violations or notice of acts, which in the exercise of reasonable diligence, would lead to actual knowledge. McNeal, 598 F.2d at 893 n. 11; Azalea Meats, Inc. v. Muscat, 386 F.2d 5, 8-9 (5th Cir. 1967). Due diligence in discovering the fraud must be shown when it has not been alleged that the defendant has actively concealed the fraud. E.g., Robertson v. Seidman & Seidman, 609 F.2d 583, 593 (2d Cir. 1979). Furthermore, in the event that a fiduciary relationship was present, the standard of reasonableness or evidence of fraudulent concealment against which the plaintiff's diligence is measured is lessened. Muscat, 386 F.2d at 9. Questions regarding due diligence are especially well suited for a jury's

consideration. Kennedy, 710 F.2d at 717."

At the worst and because the original complaint as well as the proposed amended complaint alleges a civil conspiracy among the respondent, UPS, and its Board of Directors and each of them, the rule of Zenith Radio Corp. v. Hazeltine Research, Inc., 41 U.S. 321, 338-42, 91 S.Ct. 795, 806-808, 28 L.Ed.2d 77 (1972) should apply. That rule indicates that the limitation of time runs from each overt act causing damage to the plaintiffs. Since the initiating date is August 24, 1983 in terms of focal injury sustained by the petitioners herein, the limitation of time should run from that point. At the very least, all shares sold or the sale of which was compelled by the invalid restrictions during the

statutory period should be made compensable to the petitioners. These are areas never explored by either of the Courts below. These are areas wherein material issues of fact are present.

As Judge Friendly stated in Madison Consultants v. FDIC, 710 F.2d 57 (2nd Cir. 1983):

> "A contrary result would defeat the purpose of Rule 10b-5 which is to be read 'not technically and restrictively, but flexibly to effectuate its remedial purposes.' SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195, 84 S.Ct. 275, 284, 11 L.Ed.2d 237 (1963). A technical construction of standing to sue under Rule 10b-5 would work a serious injustice here, since on the facts pleaded plaintiffs lost several hundred thousand dollars in gain they would have realized from a sale of the stock with restrictive legends removed. Their failure to take steps to realize that gain was allegedly caused by defendants' false assurances. We accordingly hold that plaintiffs have standing to invoke Rule 10b-5."

Has not the same thing happened here? Non-realization of hundreds of thousands of dollars, if not in the millions, primed by deception consisting of the imposition of restrictions in violation of law and the Certificate of Incorporation of UPS.

The essence of Madison Consultants lies in the fact that with knowledge there is action. The petitioners could have removed these invalid restrictions with injunctive relief or a plenary lawsuit. Such knowledge would be crucial to the petitioners. TSC Industries Inc. v. Northway, Inc., 426 U.S. 438, 449, 96 S.Ct. 2126, 2132, 48 L.Ed.2d 757 (1976).

The success of those efforts is not in doubt in view of the strictures of 202(b).

The entire policy of issuance of stock by UPS is discriminatory. Its officers and directors are not subject to the restrictions imposed by the Plan.

There are areas which can be developed at trial. The grant of summary judgment prevents that inquiry.

This Court has recently stated in Gould v. Ruesenacht, ___ U.S. ___, 105 S.Ct. 2308, ___ L.Ed.2d ___ (1985) as follows:

> "Therefore, under respondents' theory, the Act's applicability to a sale of stock such as that involved here would rarely be certain at the time of the transaction..... Rather, it would depend on findings of fact made by the Court--often only after extensive discovery and litigation."

Therefore, this Court has recognized the importance of determining factual issues through the trial process,

especially in securities cases. That approach should be employed in this case.

CONCLUSION

The issues in this case concern themselves with the policy of shareholder-employees who, after receiving stock, are compelled to dispose of that stock at prices which are less than fair market value. When we consider the fact that the Charter of the respondent, UPS, affords the shareholder-employee unfettered alienation, the imposition of a lesser standard is deceptive and violative of the securities laws of the nation.

With a reversal of the orders below, the petitioners can prove the insidiousness of the restrictions upon

the stock.

For the reasons set forth above, a writ of certiorari should issue to review the order of the Second Circuit.

Respectfully submitted,

LEONARD KREINCES
KREINCES, HEMLEY & O'BRIEN
49 Halstead Avenue
Harrison, New York 10528
(914) 835-1704

Attorneys for Petitioners,
Anne M. Goldberg, et al.

August 26, 1985

APPENDIX

APPENDIX A

OPINION OF DISTRICT COURT DATED JANUARY 7, 1985

UNITED STATES DISTRICT COURT

E.D. NEW YORK

Jan. 7, 1985

No. 84 CV 1076

ANNE M. GOLDBERG, DANIEL GARNER, GERALD GARNER, DANIEL GARNER, and HARVEY GARNER, as Trustees of G FAMILY TRUST #1, GERALD J. GARNER and HARVEY GARNER, as Trustees of G FAMILY TRUST #2, GERALD J. GARNER and DANIEL GARNER as Trustees of G FAMILY TRUST #3, DANIEL GARNER and HARVEY GARNER, as Trustees of G FAMILY TRUST #11, GERALD J. GARNER and HARVEY GARNER, as Trustees of G FAMILY TRUST #12, LOUIS GOLDBERG and others similarly situated,

Plaintiffs,

v.

UNITED PARCEL SERVICE OF AMERICA, INC., FIDELITY UNION BANK, LARRY P. BREAKIRON, CHARLES R. BUCKRIDGE, WALTER E. DANIELEWSKI, CARL KAYSEN, GEORGE C. LAMB, JR.,

DONALD W. LAYDEN, GARY E. MacDOUGAL, KENT C. NELSON, PAUL OBERKOTTER, JOHN W. ROGERS, GEORGE P. WILLIAMS, III,

Defendants.

Garner, Kreinces, Lichtenstein & Schindel by Leonard Kreinces, Mamaroneck, N.Y., for plaintiffs.

Schnader, Harrison, Segal & Lewis by Irving R. Segal, Philadelphia, Pa., Proskauer, Rose, Goetz & Mendelsohn by George G. Gallantz, New York City, for defendant United Parcel Service of America, Inc.

Riker, Danzig, Scherer & Hyland by Robert Fischer III, Newark, N.J., Cooper, Dunham, Clark, Griffin & Moran by Jules P. Kirsch, New York City, for defendant Fidelity Union Bank.

MEMORANDUM AND ORDER

PLATT, District Judge.

Defendants in this action have moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiffs cross-moved for certification as a class. For the reasons stated below, the defendants' motion is granted and therefore, the Court need not reach a decision on the class certification motion.

BACKGROUND

Plaintiffs, former United Parcel Service (UPS) employees and their families, initially alleged that defendants violated three anti-fraud provisions of the federal securities laws, by making false representations and omitting material facts with respect to the terms on which UPS stock

would be repurchased by UPS after plaintiff Louis Goldberg's retirement. Specifically, plaintiffs believe that they have a right to have their 26,144 shares of stock repurchased at the fair market value of the stock, a price which, they believe, would be higher than the $11 per share price tendered by the Board of Directors.

Defendants deny their allegations of fraud. They argue that plaintiffs were contractually bound to sell their stock back to UPS under the terms of the trust which was created to hold employee-owned stock such as plaintiffs'. In addition, defendants assert that since the sections of the Securities Act of 1933, upon which plaintiffs rely for their claim, are directed to fraud against purchasers, the plaintiffs, as sellers, do not have stand-

ing to state a claim under those sections.

Plaintiffs argue that the employee Stock Trust Agreement violates both the UPS Certificate of Incorporation and Delaware law, and is therefore invalid. Plaintiffs also allege that they are both purchasers and sellers of UPS stock.

FACTS

United Parcel Service of America, Inc., or UPS, is essentially an employee-owned Delaware corporation whose stock is not traded on any securities exchange or in the organized over-the-counter market. UPS, since its establishment, has sought to keep ownership of its stock in the hands of its own managers and supervisors, and to that end established, in 1954, a Managers Incentive Plan (hereinafter cited as the "Plan") whereby eligible employees

were awarded shares of UPS stock as a bonus or were awarded the right to purchase shares of the stock. All stock awarded under this Plan is subject to the UPS Managers STock Trust (hereinafter the "Trust"). Upon receiving stock from UPS pursuant to the Plan, the recipient signs the Trust deposit agreement, which clearly states on the back that all the Trust provisions and restrictions apply to stock held on deposit. After the stock is deposited into the Trust, which is held by co-defendant Fidelity Union Bank, the beneficiary receives a Stock Trust receipt, which has the provisions of the UPS Managers Stock Trust Agreement printed on the other side. Copies of the UPS Managers Stock Trust Deposit Agreement and the UPS Man-

agers Stock Trust Receipt appear in the parties' moving papers and subsequent correspondence adding to the record after oral argument on the motion. It should be noted that on the front of the Deposit Agreement right above Louis Goldberg's signature is the statement: "I have read the trust agreement provided on the reverse side hereof and agree to its terms."

An employee may at any time request withdrawal of his shares for transfer purposes, but, UPS is entitled, pursuant to the Trust Agreement, to purchase the stock back from the employee at the fair market value as set by the Board. In addition, if a member of this Plan ceases to be an employee of the company, UPS reserves the right to purchase his shares at the fair market value, subject to some

variation depending on the number of shares held by the employee. For example, if the employee holds less than 500 shares, UPS, within three years, may elect to purchase all or part of the member's shares at the fair market value. If the employee holds more than 500 shares, UPS may purchase a maximum annual amount equal to 10% of the shares held by the employee over a thirteen-year period.

UPS's certificate of incorporation permits the fair market value of the shares to be determined quarterly by the UPS Board of Directors. Paragraph 6 of the Trust Agreement provides that the shares can be repurchased by the Company at the fair market value. It also provides that where there is a conflict over the fair market value between the share-

holder and UPS, the value will be set at the average price per share of all shares sold in the twelve-month period immediately preceding the receipt by the company from the Trustee of the shares being purchased.

Plaintiff Louis Goldberg acquired all of his UPS stock pursuant to the Plan by way of purchase option and awards made to him during his employment. These shares amounted to $65,358 at the time of his retirement in January 1978, although he transferred some of his stock to his wife and family members. Although the rights of the members of the Trust are not sssignable, employee-members are permitted to transfer shares to immediate family members; the stock held by these family members remains subject to the

trust agreement covering the stock.

UPS notified Mr. Goldberg in April 1983 of its intention to exercise its purchase option of Goldberg's stock. The number of shares UPS was permitted to repurchase during that particular installment amounted to 26,144 shares.

The 26,144 shares represented the 10% annual installment, adjusted for the November 1982 four-for-one stock split. UPS exercised its purchase option on August 24, 1983 at a price of $11 per share; this price was set by the Board of Directors at its previous quarterly meeting. UPS also exercised its option with respect to some 600 other shareowners, purchasing in total over 2,000,000 shares at $11 per share. Two days later, on August 26, 1983, the Board released its

next quarterly announcement, in which it established a new fair market value of UPS stock of $18.50.

DISCUSSION

A motion for summary judgment will be granted where the record, read in the light most favorable to the non-moving party, reveals that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

[1,2] In order for a plaintiff to maintain an action under rule 10b-5 of the federal securities laws, he must show causation; that is, he must demonstrate that he relied to his detriment on the alleged misrepresentation or fraud. Under the terms of the Trust Agreement all employees are required, upon termina-

tion of employment, to sell their stock back to UPS. Mr. Goldberg had full notice of this requirement and herein may not claim that he relied to his detriment on any alleged misrepresentation or fraud. Understandably he and his family are upset that the Board raised the price of each share by $2.50 two days after they repurchased a considerable number of plaintiff's shares, but this they had the right to do under the terms of the Trust. In short, plaintiffs cannot show the requisite causation to maintain a securities fraud claim.

[3] Besides their fraud claim, plaintiffs claim that the Trust Agreement is inconsistent with the Certificate of Incorporation and Delaware law is also unfounded. UPS's company philosophy from

the beginning has reflected a desire to keep all of its stock in the hands of its managers and supervisors. To that end, the Certificate of Incorporation provided a right of first refusal to purchase UPS stock prior to any stockholder transferring that stock to another party. The Trust Agreement, formed in 1958, serves these same ends.

[4] Plaintiffs' final claim that the Trust Agreement is prohibited by Delaware law is also unfounded. Section 202(b) of the Delaware Corporation Law provides that restrictions on the transfer of securities of a corporation may be imposed by an "agreement among any number of security holders or among such holders and the corporation." Plaintiffs agreed to the provisions of the Trust

whenever they purchased or received stock from UPS. It should be noted that the stock that Louis Goldberg received prior to the formation of the Trust Agreement, that is, before 1958, is also subject to the terms of the Trust.

For the reasons stated above, the defendants' motion is granted.

SO ORDERED.

APPENDIX B

ORDER AND JUDGMENT OF COURT OF APPEALS DATED MAY 30, 1985

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 85-7074

Filed - May 30, 1985

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of May one thousand nine hundred and eighty-five.

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE AMALYA L. KEARSE,
Circuit Judges,

HONORABLE JACOB MISHLER*,
District Judge.

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*Of the Eastern District of New York, sitting by designation.

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ANNE M. GOLDBERG, DANIEL GARNER, GERALD GARNER, DANIEL GARNER, and HARVEY GARNER, as Trustee of G FAMILY TRUST #1, GERALD J. GARNER and HARVEY GARNER, as Trustees of G FAMILY TRUST #2, GERALD J. GARNER and DANIEL GARNER as Trustees of G FAMILY TRUST #2, DANIEL GARNER and HARVEY GARNER, as Trustees of G FAMILY TRUST #11, GERALD J. GARNER and HARVEY GARNER, as Trustees of G FAMILY TRUST #12, LOUIS GOLDBERG and others similarly situated,

Plaintiffs-Appellants,

-against-

UNITED PARCEL SERVICE OF AMERICA, INC., FIDELITY UNION BANK, LARRY P. BREAKIRON, CHARLES R. BUCKRIDGE, WALTER E. DANIELEWSKI, CARL KAYSEN, GEORGE C. LAMB, JR., DONALD W. LAYDEN, GARY E. MacDOUGAL, KENT C. NELSON, PAUL OBERKOTTER, JOHN W. ROGERS, GEORGE P. WILLIAMS, III,

Defendants-Appellees.

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Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Anne Goldberg, Louis Goldberg and their children, both individually and as trustees of various family trusts (hereinafter collectively referred to as the "Goldbergs"), assert that United Parcel Service, Inc. ("UPS") violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, by purchasing their UPS

stock pursuant to the UPS Managers Stock Trust and by failing to inform them of the provisions of the Certificate of Incorporation concerning rights of first refusal. They have demonstrated no connection, however, between the alleged fraud and the sale of their stock, a necessary element of a claim pursuant to Rule 10b-5. See Ryan v. J. Walter Thompson Co., 453 F.2d 444 (2d Cir. 1971), cert. denied, 406 U.S. 907 (1972). Indeed, their obligation to sell is manifest, as the restrictions imposed by the UPS Managers Stock Trust are justified by a valid corporate purpose, and thus are valid under Delaware law. See Lawson v. Household Fin. Corp., 17 Del. Ch. 343, 152 A.

723 (1930). Moreover, each time Louis Goldberg received or purchased UPS stock, he signed a Trust Deposit Agreement stating, "I have read the agreement . . . and agree to its terms."

2. The Goldbergs' claims pursuant to the Securities Act of 1933 are barred by the relevant statutes of limitations. Their claim under section 12(2) is untimely because it was brought considerably more than three years after the stock was purchased, see 15 U.S.C. § 77m (1982). Their claims under sec-section 17(c) are governed by a limitations period of six years after purchase, or two years after the fraud was, or should reasonably have been discovered, whichever is longer.

Armstrong v. McAlpin, 699 F.2d 79, 86-87 (2d Cir. 1983). The Goldbergs argue that the statute should be tolled because they did not know until 1984 that the sale restrictions in the Certificate of Incorporation differed from those set out by the Trust. The terms of the Certificate of Incorporation were set out in the prospectus sent to them every year since 1973, however, and they are chargeable with knowledge of the contents of those documents. See Buder v. Merrill Lynch, Pierce, Fenner & Smith, 644 F.2d 690, 693 (8th Cir. 1981). The limitations period, therefore, must be deemed to have run by the time the action was commenced in 1984.

3. We have considered the Goldbergs' other arguments, and find them to be without merit.

4. Accordingly, the judgment of the distrist court is affirmed.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN,

/s/ Amalya L. Kearse
AMALYA L. KEARSE,
Circuit Judges,

/s/ Jacob Mishler
JACOB MISHLER,
District Judge.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX C

RESTATED CERTIFICATE OF INCORPORATION OF UNITED PARCEL SERVICE OF AMERICA, INC.

RESTATED CERTIFICATE OF INCORPORATION
OF
UNITED PARCEL SERVICE OF AMERICA, INC.

UNITED PARCEL SERVICE OF AMERICA, INC., a Corporation organized and existing under the laws of the State of Delaware, hereby certifies as follows:

1. The name of the Corporation is UNITED PARCEL SERVICE OF AMERICA, INC.

The date of filing its original Certificate of Incorporation with the Secretary of State was May 9, 1930.

2. This Restated Certificate of Incorporation restates and integrates and further amends the Certificate of Incorporation of this Corporation by amending

Article SECOND relating to the address of the registered office and the name and address of the registered agent of the Corporation; amending Article THIRD relating to the purposes of the Corporation; eliminating Article SIXTH relating to the statement as to the amount of capital with which the Corporation was to begin business and the names of the original subscribers and the number of shares subscribed; renumbering Article SEVENTH to new number SIXTH; eliminating as unnecessary under the law Article EIGHTH relating to the immunity of the private property of stockholders from corporate debts; renumbering Article NINTH to new number SEVENTH; amending Article TENTH relating to the powers conferred upon the Board of Directors and renumbering the Article

from TENTH to EIGHTH; renumbering Articles ELEVENTH and TWELFTH to new numbers NINTH and TENTH, respectively; eliminating as unnecessary under the law Article THIRTEENTH relating to the power to issue options or rights for the purchase of stock; renumbering Article FOURTEENTH to new number ELEVENTH; adding a new Article TWELFTH relating to the reservation of the right to amend, etc. the Certificate of Incorporation; eliminating Article FIFTEENTH relating to compromises or arrangements between the Corporation and its creditors and/or the Corporation and its stockholders; and eliminating Article SIXTEENTH relating to an obsolete restriction on amendments to the Certificate of Incorporation.

3. The text of the Certificate

of Incorporation as amended or supplemented heretofore is further amended hereby to read as herein set forth in full:

FIRST: The name of the Corporation is UNITED PARCEL SERVICE OF AMERICA, INC.

SECOND: The address of its registered office in the State of Delaware is No. 100 West Tenth Street, in the City of Wilmington, County of New Castle. The name of its registered agent at such address is The Corporation Trust Company.

THIRD: The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware.

FOURTH: The number of shares of capital stock which the Corporation

hall have authority to issue is Ten Million (10,000,000), which are all of one class; the par value of each of such shares is Three Dollars ($3), the aggregate par value of the shares so authorized being Thirty Million Dollars ($30,000,000).

FIFTH: (1) No shares of stock in this Corporation, or any interest in said shares, shall be transferred to any person, form or corporation (except to this Corporation itself) unless the said shares shall have been first offered for sale to this Corporation at the same price and on the same terms upon which the same are to be offered to the proposed transferee, as hereinafter set forth. (For exceptions relating to gifts, inheritance, etc., see paragraph 6.)

(2) A stockholder who in good faith desires to transfer to a transferee, other than this Corporation itself, all or any of his shares in this Corporation shall first deliver to the treasurer of this Corporation written notice of his intention to make such transfer, stating the number of shares to be transferred, the name and address of the proposed transferee, and the price and terms upon which said shares will be transferred. Such notice shall also bear a statement signed by the proposed transferee representing that the information therein set forth is true and correct.

(3) For a period of thirty (30) days after the receipt of such notice of intention by the treasurer, this Corporation shall have the exclusive

option to purchase all, but not a part, of said shares, and may purchase the same within said thirty (30) days at the price and on the terms set forth in said notice of intention. In the event said notice of intention describes a consideration other than money, this Corporation may purchase said shares for a sum of money constituting the fair equivalent of said proposed consideration. Such option shall be exercised by mailing, prior to the expiration of said thirty (30) day period, to the stockholder, at his or its last known address, written notice by the Corporation signed by the treasurer or an assistant treasurer of its election to exercise said option.

(4) If the Corporation shall fail, within said thirty (30)

day period, to exercise its option as above set forth, or if the Corporation shall by writing signed by its treasurer or an assistant treasurer either elect not to exercise such option or to waive said option without prior receipt of formal notice of a proposed transfer, the stockholder may within a period of twenty (20) days after the expiration of either the said thirty (30) day period or the execution of said written election or waiver, as the case may be, sell pursuant to the notice of intention given by him or the written waiver, as the case may be, all, but not a part, of the shares therein described to the person, firm or corporation, and none other, therein described for the price and on the terms therein described.

(5) If the Corporation fails to exercise its option hereunder, and the transfer as proposed is made, the transferee shall thereafter hold said shares subject to all the restrictions herein provided. If the Corporation fails to exercise or waives its option hereunder, and the proposed transfer is not made within said twenty (20) day period, no future proposed transfer, whether to the same or a different proposed transferee or whether on the same or different terms, may be made until and unless the procedure hereinabove set forth has been again followed.

(6) A transfer of shares, or interest therein, by way of a bona fide gift or by way of inheritance shall not require a prior offering to the

Corporation as herein provided, but the donee, legatee or other recipient thereof shall hold the said shares subject to the restrictions herein provided. A transfer of a security interest in shares of this Corporation, whether by pledge, mortgage, deposit or otherwise, shall not require a prior offering to the Corporation, but no purchaser at any sale, private or judicial, upon foreclosure or execution shall become the owner of said shares or have the said shares registered in his or its name until he or it shall have first offered, as herein provided, the said shares to this Corporation at the same price, and on the same terms and conditions bid by him at the said foreclosure or execution sale.

(7) The restrictions

herein contained upon the sale or transfer of shares in this Corporation shall apply to all shares in the hands of all holders or owners, whether original stockholders or subsequent purchasers or transferees, and whether acquired through the voluntary or involuntary act of a stockholder or by operation of law, and whether part of the first authorized issue or of any subsequent or increased issue.

(8) Regulations as to the procedure to be followed in effecting the transfer of shares and the exercise and waiver of the option of the Corporation hereunder may be further prescribed in the by-laws of this Corporation.

SIXTH: The Corporation is to have perpetual existence.

SEVENTH: The number of directors of the Corporation constituting the whole Board, shall be fixed in the manner provided by the by-laws. The election of directors need not be by ballot unless the by-laws so require.

EIGHTH: In furtherance and not in limitation of the powers conferred by the laws of the State of Delaware, the Board of Directors is expressly authorized:

(a) To make, alter, amend and repeal the by-laws of the Corporation, in any manner not inconsistent with the laws of the State of Delaware or of the Certificate of Incorporation of the Corporation, subject to the power of the holders of the capital stock to alter or

repeal the by-laws made by ghe Board of Directors;

(b) Subject to the applicable provisions of the by-laws then in effect, to determine from time to time whether and to what extent and at what times and places and under what conditions and regulations the accounts and books of the Corporation, or any of them, shall be open to the inspection of the stockholders; and no stockholder shall have any right to inspect any account or book or document of the Corporation except as conferred by the laws of the State of Delaware unless and until authorized so to do by resolution of the Board of Directors, or of the stockholders of the Corporation;

(c) To mske reasonable regulations subject to the limitations prescribed by statute, for the closing of the stock transfer books in anticipation of any meeting of the stockholders of the Corporation and for the fixing (without the closing of said books) of dates as of which lists of stockholders entitled to vote at any such meeting shall be prepared;

(d) To determine whether any, and, if any, what part, of the annual net profits of the Corporation or of its surplus shall be declared in dividends and paid to the stockholders, and to direct and determine the use and disposition of any such annual net profits or surplus;

(e) To fix from time to time the amount of the profits of the Corporation to be reserved as working capital or for any other lawful purpose and from time to time to increase, diminish and vary the accounts so set aside for working capital and for other corporate purposes, in the absolute discretion of the Board of Directors.

In addition to the powers and authorities hereinbefore or by statute expressly conferred upon them, the Board of Directors may exercise all such powers and do all such acts and things as may be exercised or done by the Corporation, subject, nevertheless, to the provisions of the laws of the State of Delaware, of the Certificate of Incorporation and of the by-laws of the Corpo-

ration.

NINTH: At any time and from time to time when authorized by resolution of the Board of Directors and without any action by its stockholders, except as otherwise specifically provided by the Certificate of Incorporation and the by-laws of the Corporation, and subject, nevertheless, to the provisions of the laws of the State of Delaware, the Corporation may issue or sell any shares of its capital stock of any class, whether out of the unissued shares thereof authorized by the Certificate of Incorporation of the Corporation as originally filed or by any amendment thereof or out of shares of its stock acquired by it after the issue thereof, and whether or not the shares thereof so issued or

sold shall confer upon the holders thereof the right to exchange such shares for other shares of stock of the Corporation of any class or classes. In each case the consideration to be received by the Corporation, for any such shares so issued or sold shall be fixed from time to time by resolution of the Board of Directors. Each share of the capital stock of the Corporation issued or sold pursuant to the foregoing provisions of this Article NINTH, and the full consideration for which in each case as so fixed by the Directors shall have been paid or delivered to the Corporation, shall be conclusively deemed to be full paid stock and shall not be liable to any further call or assessments thereon, and the holder thereof shall not be liable

for any further payments in respect thereof. The Corporation may receive in payment, in whole or in part, for any shares of its stock issued or sold by it, cash, labor done, personal property or real property or leases thereof; and in the absence of actual fraud in the transaction, the judgment of the directors of the Corporation as to the value of the labor, property, real estate or leases thereof so received shall be conclusive.

TENTH: No holder of stock of any class of the Corporation shall have any preemptive or preferential right of subscription to any shares of any class of stock of the Corporation whether now or hereafter authorized, or to any obligation convertible into stock of the Corporation, or any right of subscription

therefor, other than such rights, if any right of subscription therefor, other than such rights, if any, as the Board of Directors in its discretion may from time to time determine.

ELEVENTH: No contract or other transaction between the Corporation and any other corporation and no act of the Corporation shall in any way be affected or invalidated by the fact that any of the directors of the Corporation are pecuniarily or otherwise interested in, or are directors or officers of, such other corporation; any director individually or any firm of which any director may be a member, may be a party to, or may be pecuniarily or otherwise interested in, any contract or transaction of the Corporation, provided that the fact

that he or such firm is so interested shall be disclosed or shall have been known to the Board of Directors or such members thereof as shall be present at any meeting of the Board at which action upon any such contract or transaction shall be taken; and any director of the Corporation who is also a director or officer of such other corporation or who is so interested may be counted in determining the existence of a quorum at any meeting of the Board of Directors of the Corporation which shall authorize any such contrsct or transaction, and may vote thereat to authorize any such contract or transaction, with like force and effect as if he were not such director or officer of such other corporation or not so interested.

Any contract, transaction or act of the Corporation or of the directors or of any committee, which shall be ratified by a majority of a quorum of the stockholders of the Corporation at any annual meeting, or at any special meeting called for such purpose, shall, insofar as permitted by law or by the Certificate of Incorporation of the Corporation, be as valid and as binding as though ratified by every stockholder of the Corporation.

TWELFTH: The Corporation reserves the right to amend, alter, change or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred upon stockholders herein are granted subject

to this reservation.

4. This Restated Certificate of Incorporation was duly adopted by vote of the stockholders in accordance with Sections 242 and 245 of the General Corporation Law of Delaware.

IN WITNESS WHEREOF, said UNITED PARCEL SERVICE OF AMERICA, INC. has caused its corporate seal to be hereunto affixed and this certificate to be signed by PAUL OBERKOTTER, its President, and attested by PRESTON W. DAVIS, its Secretary, this 13 day of May, 1970.

UNITED PARCEL SERVICE OF AMERICA, INC.

By: /s/ Paul Oberkotter
President

(CORPORATE SEAL)

ATTEST:

By: /s/ Preston W. Davis
Secretary

STATE OF NEW YORK :

ss:

COUNTY OF NEW YORK :

BE IT REMEMBERED that on this 13th day of May, 1970, personally came before me, a Notary Public in and for the County and State aforesaid, PAUL OBERKOTTER, President of United Parcel Service of America, Inc., a corporation of the State of Delaware, and he duly executed said certificate before me and acknowledged the said certificate to be his act and deed and the act and deed of said corporation and the facts stated therein are true; and that the seal affixed to said certificate and attested by the Secretary of said corporation is the common or corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office the

day and year aforesaid.

/s/ Edwin H. Reitman
Notary Public

EDWIN H. REITMAN
Notary Public, State of New York
No. 31-3248930
Qualified in New York County
Commission Expires March 30, 1971

NOTARIAL
(SEAL)

State of Delaware

Office of Secretary of State.

I, Eugene Bunting, Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of

Restated Certificate of Incorporation of the "UNITED PARCEL SERVICE OF AMERICA, INC.", as received and filed in this office the eighteenth day of May, A.D. 1970, at 10 o'clock A.M.

In Testimony Whereof, I have hereunto set my hand and official seal at Dover this twenty-fifth day of May in the year of our Lord one thousand nine hundred and seventy.

Eugene Bunting

Secretary of State

R H Caldwell

Asst. Secretary of State

FORM 181

APPENDIX D

FIRST AMENDED COMPLAINT FOR DAMAGES ARISING FROM SECURITIES FRAUD

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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ANNE M. GOLDBERG, DANIEL GARNER, GERALD GARNER, DANIEL GARNER AND HARVEY GARNER, as Trustees of G FAMILY TRUST # 1, GERALD J. GARNER and HARVEY GARNER, as Trustees of G FAMILY TRUST # 2, GERALD J. GARNER and DANIEL GARNER as Trustees of G FAMILY TRUST # 3, DANIEL GARNER and HARVEY GARNER, as Trustees of G FAMILY TRUST # 11, GERALD J. GARNER and HARVEY GARNER, as Trustees of G FAMILY TRUST # 12, GERALD J. GARNER and DANIEL GARNER as Trustees of G FAMILY TRUST # 3, LOUIS GOLDBERG and others similarly situated,

Plaintiffs,

-against-

UNITED PARCEL SERVICE OF AMERICA, INC., FIDELITY UNION BANK, LARRY P. BREAKIRON, CHARLES P. BUCKRIDGE, WALTER E. DANIELEWAKI, CARL KAYSEN, GEORGE C. LAMB, JR., DONALD W. LAYDEN, GARY E. MacDOUGAL, KENT C. NELSON, PAUL OBERKOTTER, JOHN W.

ROGERS, GEORGE P. WILLIAMS, III,

Defendants.

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84 CIV. 1076 (TCP)

CLASS ACTION -

FIRST AMENDED COMPLAINT FOR DAMAGES ARISING FROM SECURITIES FRAUD

PLAINTIFFS DEMAND TRIAL BY JURY

Plaintiffs, by their attorneys, as and for their First Amended Complaint against the defendants, allege:

JURISDICTION AND VENUE

1. This Court's jurisdiction is based upon violations of Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. Section 78j (b)] and Rule 10b-5 thereunder [17 C.R.F. Section 240.10b-5]

and Section 17(a) of the Securities Exchange Act of 1933 [15 U.S.C. Section 77q(a)] and Section 12(2) of the 1933 Act [15 U.S.C. 77(1)].

THE PARTIES

2. At all times herein mentioned, and at the time of the transactions complained of herein, the plaintiffs are citizens of the United States and residents of the State of New York and were the owners of the common stock of the defendant, UNITED PARCEL SERVICE OF AMERICA, INC. (U.P.S.).

CLASS ACTION ALLEGATIONS

3. A. Plaintiffs bring and prosecute this action pursuant to Rule 23 of the Federal Rules of Civil Procedure as amended, as a "Class Action" for themselves and as representatives of and

for and on behalf of all other persons similarly situated, to wit, all holders of the shares of stock of the defendant, UPS, expressly excluding any of the named individual defendants. Those persons for and on whose behalf this action is brought are hereinafter referred to as "Class Members".

B. Plaintiffs are informed, believe and allege, that the Class Members number approximately 600 who hold approximately 2,170,000 shares of stock in the defendant, UPS and who reside in communities widely scattered throughout the United States of America and the joinder of the majority of these Class Members herein is impractical if not, impossible.

C. The plaintiffs are in-

formed and believe and allege that many of the individual Class Members own or owned during the period hereinafter allege, a small amount of shares of the stock of the defendant, UPS and that their individual loss and potential recovery is or maybe so modest as to preclude them from individual litigation of their respective claim by reason of the cost involved. As a result, such members may never have their day in court unless this action is allowed to be prosecuted and tried as a Class Action pursuant to and as provided by Rule 23 of the Federal Rules of Civil Procedure. Only the defendant, UPS has a full list of shareholders and amounts which they hold which could substantiate and help to enlighten the court in connection with averment.

D. The prosecution of separate actions by the individual Class Members, even if possible, would create the risk of (1) inconsistent or varying adjudications with respect to individual Class Members against the defendants and which would establish incompatible standards of conduct for the defendants or (2) adjudications with respect to individual Class Members which would, as a practical matter be dispositive of the interest of the other Class Members not parties to the adjudication or which would substantially impair or impede the ability of the Class Members to protect their interests.

E. There are substantial questions of law, in fact common to the claims of the plaintiffs against the

defendants and to the claim of each of the Class Members against the defendants. Questions of law governing and dispositive of plaintiffs' claims against defendants are precisely the same as the question of law governing and dispositive of the claims against the defendants of each Class Member. Except as to the sole question of the number of shares of the stock of the defendant, UPS, owned by each Class Member and the correlative loss thereon, questions of fact governing and dispositive of plaintiffs' claims against the defendants are precisely the same as the questions of fact governing and dispositive of the claims of each Class Member against the defendants. The critical question of fact and law common to the class, is whether the restrictions

placed upon their ownership of the stock of the defendant, UPS was authorized in law and whether the defendants and each of them conspired together to deceive plaintiffs and the other Class Members of the truth that such UPS Stock Manager Trust Agreement ("Trust Agreement") was not binding and a valid contractual obligation on the part of such plaintiffs or other Class Members, so that when the stock was purchased and sold by the plaintiffs to the defendant, UPS, such fraud and deception was inherent in such transactions.

F. The claims of the plaintiffs herein are typical in all important respects of the claims of each and all of the Class Members and are based upon and arise out of the identical facts consti-

tuting unlawful conduct of the defendants, namely, the creation of the Trust Agreement as an illegal and invalid contractual obligation on the part of the plaintiffs and all other Class Members in violation of the Certificate of Incorporation of the defendant, UPS.

G. The plaintiffs herein will fairly and adequately represent the interest of the class and the individual Class Members because by reason of the similarity or identity of the claims of the plaintiffs and the individual Class Members, the successful assertion of plaintiffs' claims herein will necessarily establish determinations of fact and law adequate to prove the liability of defendants and each of them to each Class Member and more particularly, the plain-

tiff, LOUIS GOLDBERG, was an employee of the defendant, UPS for approximately 50 years and therefore as to himself and those other Class Members, the majority to which were members before 1958, the date of the aforesaid Trust Agreement, the plaintiffs herein will be in a better position to fairly and adequately represent the interest of the class and the individual Class Members.

H. The questions of law and fact common to the plaintiffs against the defendants and to the claims of all Class Members against the defendants, predominate questions, if any affecting only individual member in a class action superior to other available methods, if, in fact, any such other methods are available which plaintiffs deny, for the

fair and efficient adjudication of claims alleged herein.

I. Subdivision (a) - Each representative of the class is a shareholder of the defendant UPS and it is probsble that their interest lie in being part of the class rather than individually controlling the prosecution of separate agreements, especially in view of the allegations in subparagraph (b) hereof.

Subdivision (b) - The plaintiffs have no knowledge of any controversy already commenced by or against members of the class.

Subdivision (c) - This forum, having jurisdiction of the plaintiffs' claims, is in a desirable position to hear and determine such claims especi-

ally since the State of New York has employed a majority of the shareholders which comprise the class sought to be established herein.

Subdivision (d) - At the present time, the plaintiffs do not countenance any difficulties in the management of the class action because, as alleged in the Answer to the original Complaint of these plaintiffs, the shareholders number 600 and they hold approximately 2,170,000 shares. Such a class is not unmaragable.

4. A. The defendant, U.P.S., is a corporation existing under the laws of the State of Delawwre. Its principal office is located in Greenwich, Connecticut. U.P.S. is doing business in the State of New York.

B. The defendant, FIDELITY UNION BANK (FIDELITY), is a corporation formed under the laws of the State of New Jersey and it operates a bank in Newark, New Jersey. Fidelity is doing business in the State of New York. Fidelity is the Trustee under the U.P.S. Managers Stock Trust Agreement ("Trust Agreement") executed by the plaintiffs to defendants, U.P.S. and FIDELITY and an exact copy is annexed hereto and made part hereof and marked Exhibit "A".

C. The defendants, LARRY P. BREAKIRON, CHARLES R. BUCKRIDGE, WALTER E. DANIELEWAKI, CARL KAYSEN, GEORGE C. LAMB, JR., DONALD W. LAYDEN, GARY E. MacDOUGAL, KENT C. NELSON, PAUL OBERKOTTER, JOHN W. ROGERS and GEORGE P. WILLIAMS, III, are the directors of U.P.S.

5. The above-named defendants, and each of them, stood in fiduciary relationship to the plaintiffs herein and negligently and carelessly failed to carry out their fiduciary duties to the plaintiff.

FIRST COUNT

SECURITIES FRAUD

(AGAINST ALL DEFENDANTS: VIOLATION OF SECTIONS 17(a) and 12/2 OF THE SECURITIES ACT [15 U.S.C. Sections 771(2) AND 77g(a)], Section 10(b) OF THE EXCHANGE ACT [15 U.S.C. Section 78j(b)], RULE 10b-5 THEREUNDER [17 C.F.R. Section 240.10b-5])

6. Plaintiffs repeat and reallege each and every allegation of paragraphs "1" through "5" inclusive, with the same force and effect as though fully set out herein.

7. The sale of the shares of stock in U.P.S. constitutes "securities"

as that term is defined in Section 2(1) of the Securities Act [15 U.S.C. Section 77b(1)] and in Section 3(10) of the Exchange Act [15 U.S.C. Section 78c(10)].

8. In connection with the sale of securities prior to and within the past six (6) years to and including about August 24, 1983 and in violation of Section 10(b) and Rule 10b-5 thereunder of the Securities Exchange Act of 1934 (15 U.S.C. Section 78j(b) and 17 C.F.R. 240.10b-5), defendant U.P.S., by the use of means or instrumentalities of interstate commerce and of the mails, directly or indirectly and knowingly or with reckless disregard committed the following acts:

(a) employed a device, scheme or artifice to defraud;

(b) obtained money and property by means of untrue statements of material facts and of omission to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and

(c) engaged in transactions, practices and a course of business which operated as a fraud and deceit on the plaintiffs, all as more fully described below.

9. At all times material hereto, in the course of the sale of the securities by the plaintiffs to the defendants, U.P.S. and FIDELITY, these defendants, knowingly or with reckless disregard, omitted to state certain material facts including those set forth in paragraphs

10 and 11 herein. Such material facts were necessary to make the following not misleading: (1) statements in the Trust Agreement issued by the defendants, U.P.S. and FIDELITY which they knew or should have known would be used, and were used by the plaintiffs to purchase and sell securities to the defendants, U.P.S. and FIDELITY; (2) statements and warranties which they as a dealer and implied by law, to have made to the plaintiffs; and (3) statements and warranties which they, as the only marketmaker in the securities, are implied by law to have made to the plaintiffs. Defendants U.P.S. and FIDELITY knew or should have known that plaintiffs, would be misled by such omissions. Plaintiffs in fact and as a matter of law, relied on the absence

of such omissions and the statements and warranties to which such omissions pertain and in fact were misled thereby.

10. The defendants, UPS and FIDELITY, omitted to state the following facts which omission was misleading with respect to the diligence and care with which the plaintiffs purchased and sold the securities to the defendants, U.P.S. and FIDELITY, viz, at other than their true and fair market value.

11. Omissions to state certain facts therein were as follows:

a) that defendants, U.P.S. and FIDELITY had failed to conduct a diligent research analysis wherein a true and accurate fair market value of the securities would be determined, while representing that it employed reliable

practices upon which the plaintiffs could rely;

b) that defendants, U.P.S. and FIDELITY, knew or should have known of facts and circumstances which should have prompted reasonable and diligent research and other inquiry which would have revealed, among other things, the following:

(i) that the defendants, U.P.S. and FIDELITY were not in compliance with the Federal Securities Laws as more fully described;

(ii) that the financial condition of the defendant, U.P.S. was not accurately ascertained and reported;

(iii) that U.P.S. was having a highly profitable fiscal year which fact was not reflected in the determina-

tion of fair market value;

(iv) that the defendant, U.P.S., was not making accurate reports to shareholders in that it did not include the earnings of all of its operations, both domestic and foreign;

(v) that the determination of share price by the defendant, U.P.S. was based upon opinions of a bank and investment counselors, however, the defendant, U.P.S. did not furnish those advisers with all the necessary data upon which to render reliable opinions concerning share price;

(vi) that certain assets, earnings and properties of the defendant, U.P.S., upon which it based projections of operations had not been included for the purpose of determining the share

price.

(vii) that the shares held by the plaintiffs under such circumstances were sold without their consent, and for an amount less than the market value.

(viii) Diverted income to a foreign corporation.

(ix) the defendants, U.P.S. and FIDELITY, represented that price determined by them was the fair value of the securities, however, such representation was false and deceptive in that such price was not the fair market value of the shares as provided for in Paragraph "6" of the Trust Agreement in that it omitted the earnings of all domestic and foreign operations of the defendant, U.P.S. and omitted to obtain comparable fair market value of shares of

the stock of comparable corporations performing substantially similar services as that of the defendant, U.P.S. The defendants, U.P.S. and FIDELITY represented that the price of the sale of the securities was one sum, while it determined a higher sum for others similarly situated only two (2) days later;

(x) the defendants, U.P.S. and FIDELITY, in the course of the conduct and pursuant to the scheme which may be inferred to have existed from the facts recited above, made false and misleading representations and omitted to state material facts concerning the defendant, U.P.S., as hereinbefore more fully described.

(xi) the certificate of incorporation of the defendant, UPS, pro-

vides that the defendant, UPS shall have the right of first refusal to purchase the shares of stock of shareowners thereof. The right of first refusal is exercised pursusnt to the certificate of incorporation annexed hereto and made a part hereof as Exhibit "B". The certificate of incorporation proves that each shareowner, of which the plaintiffs form a part, have the right to offer their shares of stock at an agreed price to a third party and that upon such agreement being made, the defendant, UPS shall have the right of first refusal in purchasing the shares then held by shareholders upon the same terms and provisions as proposed to the aforesaid third party. The aforesaid certificate of incorporation was originally filed with the Office of the

Secretary of State of the State of Delaware about 1930. In or sbout 1958, more particularly April 15th, the defendants, UPS and FIDELITY conspired together to promulgate the Trust Agreement and defrauded and deceived the plaintiffs that such Trust Agreement was a valid and binding contractual obligation providing for the purchase of their shares, their retention and the sale of such shares. The fact remains that the purchase of such shares or award thereof to each of the present plaintiffs and other shareowners was made pursuant to the Trust Agreement, as represented by the defendants, UPS and FIDELITY, however, were really issued pursuant to the annexed certificate of incorporation. The Trust Agreement was never executed by the def-

endant, UPS and therefore is not a mutually binding contractual obligation. Furthermore, the restriction placed upon the shares held by these plaintiffs and Class Members were and still are invalid in that they were not promulgated or created pursuant to the General Corporation Law of the State of Delaware and are in direct controvention of the Certificate of Incorporation which was not amended and which Trust Agreement does not bear shareholder approval.

(xii) The aforesaid conduct of the defendant, UPS was discriminatory in that they did not demand the purchase of the shares of each of its shareowners to wit, the shares owned by the Board of Directors and the officers of the defendant UPS and thus they are

exempt from the provisions of the Certificate of Incorporation.

12. Had the plaintiffs been aware of the aforesaid materially false and misleading omissions and representations made by the defendant, UPS, and the defendant, FIDELITY, and the individual defendants, they would not have purchased such shares and they would not have sold such shares.

13. Each of the defendants knew, or should have known and with reckless disregard of the facts, failed to know the falsity and deception of the misleading statements.

14. The acts, omissions, misrepresentations, non-disclosures and concealments of the defendants and each of them herein all were done fraudulently,

oppressively, intentionally and with wanton and reckless disregard of the plaintiffs and their financial needs.

15. As a result of the foregoing, the plaintiffs demand damages in a sum to be fixed by this Court and a jury together with interest as provided by law.

16. The defendant, FIDELITY and esch of the individual defendants aided and abetted the defendant, UPS, in each of the allegations of fraudulent conduct either by their silence or inaction or in the alternative, their participation in each act of fraudulent conduct.

COUNT II

FALSE REPRESENTATIONS

(Section 12(2) and Section 17(a) Claims)

17. Plaintiffs re-allege paragraphs 1 through 16.

18. Defendants, UPS and FIDELITY, during times material hereto, directly and indirectly, made representations and disseminated information in a manner which constituted a scheme to defraud and engaged in a course of business which these defendants knew or should have known would operate as a fraud. Plaintiffs were compelled to purchase the securities as a result of such scheme and such conduct.

19. At the time of the purchase by the plaintiffs of the shares of the defendant, UPS, the plaintiffs were unaware of the falsity of each of the representations contained in the Trust Agreement and they were unaware of each of the omissions as hereinbefore alleged. Plaintiffs did not discover the falsity

of such representations or the omissions until the sales of such shares to the defendant, UPS on or about August 24, 1983. One (1) year has not elapsed since discovering the falsity or since such disclosure had been made by the exercise of reasonable diligence, in that the plaintiffs could not have known of the contents of the Certificate of Incorporation of the defendant, UPS enacted in 1930 and that it was violated by the Trust Agreement promulgated in or about April 15, 1958.

20. As a result of the foregoing, plaintiffs demand damages against defendant in such amounts as may be fixed by this Court and a jury together with interest thereon.

WHEREFORE, the plaintiffs demand

Judgment on each Count in such amount as shall be fixed by this Court and a jury together with interest thereon as provided by law.

/s/ Leonard Kreinces
LEONARD KREINCES

LEONARD KREINCES, ESQ.
Attorney for Plaintiffs
158 West Boston Post Road
Mamaroneck, New York 10543
914-698-3313

APPENDIX E

AFFIDAVIT OF J. ROBERT PETERSON IN SUPPORT OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ANNE M. GOLDBERG, DANIEL GARNER, GERALD GARNER, DANIEL GARNER and HARVEY GARNER, as Trustees of G FAMILY TRUST # 1, GERALD J. GARNER and HARVEY GARNER, as Trustees of G FAMILY TRUST # 2, GERALD J. GARNER and DANIEL GARNER as Trustees of G FAMILY TRUST # 3, DANIEL GARNER and HARVEY GARNER, as Trustees of G FAMILY TRUST # 11, GERALD J. GARNER and HARVEY GARNER, as TRUSTEES OF G FAMILY TRUST # 12, LOUIS GOLDBERG and others similarly situated,

Plaintiffs,

v.

UNITED PARCEL SERVICE OF AMERICA, INC., FIDELITY UNION BANK, LARRY P. BREAKIRON, CHARLES R. BUCKRIDGE, WALTER E. DANIELEWSKI, CARL KAYSEN, GEORGE C. LAMB, JR., DONALD W. LAYDEN, GARY E. MacDOUGAL, KENT C. NELSON, PAUL OBERKOTTER, JOHN W. ROGERS, GEORGE P. WILLIAMS, III,

Defendants.

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AFFIDAVIT OF
J. ROBERT PETERSON

STATE OF CONNECTICUT :
: ss
COUNTY OF FAIRFIELD :

J. ROBERT PETERSON, being duly sworn according to law, deposes and says:

1. I am the Secretary of United Parcel Service of America, Inc. ("UPS" or the "Company"), a defendant in this action, and I am authorized to take this affidavit on its behalf. I submit this affidavit in support of Defendants' Motion for Summary Judgment.

2. UPS is a Delaware corporation which, through subsidiaries, is engaged in providing specialized transportation services, principally through the deliv-

ery of small packages.

3. UPS is an employee-owned company and its stock is not traded on any securities exchange or in the organized over-the-counter market.

4. UPS has consistently recognized, since its establishment in 1907, that its success is dependent upon the initiative, dedication and talent of its managers and supervisors.

5. Since approximately 1954, UPS has sought in many ways to facilitate ownership of its stock by its own managers and supervisors, so that the men and women who manage the affairs of the Company may participate in its prosperity during their years of active service. Since the late 1950's, the three principal ways used by UPS to accomplish this

objective have been the UPS Managers Incentive Plan, restrictions on the transfer of UPS stock and the UPS Managers Stock Trust.

6. In 1954, the Board of Directors of UPS adopted the UPS Managers Incentive Plan (the "Plan"). The Plan enables UPS employees to share in the ownership of UPS by the award of shares of UPS stock as a bonus. Under the Plan, in years when shares are available, eligible employees are also awarded the right to acquire shares by purchase.

7. To be eligible to receive awards of stock under the Plan, an employee must be a UPS operating center supervisor or have equal or greater managerial, supervisory or technical responsibilities. Employees are recommended to receive

awards by their supervisors each year.

8. Each year UPS sets aside a certain percentage of its profits for making awards of shares to eligible employees.

9. The value of the shares awarded to employees pursuant to the Plan is the same as the price UPS is then offering to pay its shareowners to repurchase UPS stock.

10. All of the stock of UPS, with minor exceptions, is owned by or held for the account of approximately 10,000 UPS managers and supervisors actively employed by UPS or their families, former employees, charities or charitable foundations established by company founders and their family members.

11. All UPS stock awarded under

the Plan is subject to the UPS Managers Stock Trust (the "Trust"), regardless of the status of the employee, from the Chairman of the Board to the employee operating under a supervisor.

12. The Trust is a method by which the individuals who manage and supervise the affairs of UPS are provided with a means of participating in the stock ownership of UPS during their years of active service, and by which their stock is made available for those who will manage UPS after their predecessors leave the active employ of UPS.

13. All awards of stock under the Plan are subject to the Trust; that is, for an employee to receive his award of stock pursuant to the Plan, he must agree to the terms of the UPS Managers Stock

Trust Agreement (the "Trust Agreement"), and deposit his shares in the Trust. In addition, all shares issued to holders under the Trust as stock dividends or in stock splits are retained in the Trust.

14. All shares in the Trust are held by defendant Fidelity Union Bank, as Trustee, for the account of the individual managers and supervisors, and members of their immediate families to whom shares may be transferred provided they agree to be subject to the Trust and the Trust Agreement. Under paragraph 10 of the Trust Agreement, the rights of members of the Trust are not assignable, and an attempted assignment gives UPS the immediate right to repurchase the member's shares. In general, though, UPS waives that right to permit employee-

members to transfer shares to their immediate family members, provided that these transferees execute a Trust Agreement covering the stock.

15. The Trust Agreement contains several restrictions on the transfer of stock held in the Trust. For example, if a participant wants to sell his UPS stock, he may request withdrawal of all or some of the shares held for his benefit at any time, or from time to time. However, when that request is made, UPS becomes entitled to purchase the shares at their fair market value, as defined, within sixty days of receipt of the request.

16. For many years UPS has purchased all of the shares which employees have asked to have withdrawn from the Trust, at the price which it was then

offering, except that, in some cases, it has permitted members of the Trust to sell shares held subject to the Trust to other participants in the Plan at the price then being offered by UPS, depending upon the needs of UPS for shares.

17. Paragraph 7 of the Trust Agreement gives the following rights of repurchase to UPS:

> 7. Company purchase. (a) At any time after any Member ceases to be an employee of the Company, the Company may notify the Trustee in writing of the termination of such employment. After giving such notice, the Company shall have the right to purchase shares in the manner set forth below at prices determined in accordance with paragraph 6 of the UPS Managers Stock Trust. Nothing in this Section 7 shall alter or impair the right of the Member under the UPS Managers Stock Trust to request release of the shares from the Trust, or the right of the members as a group to terminate the Trust, or the

right of the Company in either event to purchase the shares held for the benefit of the Member upon the occurrence of such event.

(b) If less than 500 common shares of the Company are held by the Trustee for the benefit of the Member when the Member ceases to be an employee of the Company, the Company, at any time and from time to time, within three years after the termination, by written notice to the Trustee, may elect to purchase all or any part of the common shares of the Company then held by the Trustee for the benefit of the Member.

(c) If 500 or more common shares of the Company are held by the Trustee for the benefit of the Member when the Member ceases to be an employee of the Company, the Company, from time to time by written notice to the Trustee, may elect to purchase during the period from the date of such termination until the June 15 or December 15 next succeeding the thirteenth anniversary of such termination, all or any part of the common shares of the Company then held by the Trustee for the benefit of the Member. However,

the Company may not purchase any shares held by the Trustee for the benefit of the Member pursuant to the provisions of this subsection (c) until the June 15 or December 15 which next succeeds the first anniversary of termination of his employment. Commencing on such June 15 or December 15, the Company may elect to purchase a maximum annual amount equal to 10% of the shares held by the Trustee for the benefit of the Member at the time of such termination, such maximum annual amount to be subject to adjustment to permit the Company's election to purchase, in appropriate installments during the remaining installment period, any securities issued at any time as a result of stock splits or stock dividends with respect to, or reclassifications of, the Company's common stock or the distribution of any rights appurtenant to such stock. Any installment or portion thereof which the Company does not purchase in any annual period may be purchased at any subsequent time until the June 15 or December 15 next succeeding the thirteenth anniversary of such termination. In the event of any stock dividend, stock split or reclassification of UPS

> common stock, the number of shares which UPS may thereafter purchase shall be adjusted proportionately to permit the purchase of all shares thereby issued, in substantially equal installments or otherwise, during the remaining period.

18. The UPS Certificate of Incorporation provides that none of UPS's outstanding shares may be transferred, except by bona fide gift or inheritance, unless the shares are first offered for sale to UPS at the same price and on the same terms as are offered to the proposed transferee.

19. The rights of repurchase set forth in the Trust Agreement implement the restrictions on transfer of stock contained in the UPS Certificate of Incorporation.

20. Since 1935, UPS has not originally issued any additional shares except

as stock splits or stock dividends.

21. All shares awarded by UPS under the Plan are shares which UPS has previously purchased from its shareowners.

22. UPS must have a means to re-acquire the stock held by former UPS employees in order for it to be able to award shares of stock to current employees, and thus maintain employee ownership of UPS stock over the years.

23. The price for the shares to be paid by the Company, as set forth in Paragraph 6 of the Trust Agreement, is the "then fair market value" of the shares. The price is determined quarterly by the UPS Board of Directors, and promptly announced to all shareowners.

24. The Trust Agreement also provides that, in the event of a differ-

ence of opinion between the Company and the shareowner as to the fair market value, such value shall be deemed to be the average price per share of all shares sold in the twelve-month period immediately preceeding the receipt by the Company from the Trustee of the shares being purchased.

25. For the last six years the price of UPS stock set by the Board in each quarter has either risen from or remained the same as the price set in the previous quarter; largely for this reason, the Board price has consistently been as high as or higher than the alternative twelve-month average price.

26. The plaintiffs in this lawsuit are Louis Goldberg, a former employee of UPS who retired on January 31, 1978;

his wife Anne M. Goldberg; their sons Daniel Garner and Gerald Garner; and the trustees for certain family trusts established by Louis and Anne Goldberg.

27. During his employment, Mr. Goldberg acquired UPS stock pursuant to the Plan, and he also purchased some shares as a member of the Plan; at the time of his retirement the shares which he had acquired amounted to 65,358 shares of UPS stock.

28. Mr. Goldberg transferred some of the stock he acquired to his wife, Anne Goldberg, and to certain family trusts established by him and his wife, and managed by their sons, Gerald Garner, Harvey Garner and Daniel Garner (the other plaintiffs).

29. The plaintiffs -- Louis

Goldberg, Anne Goldberg, their sons and the family trusts they established -- are or were all beneficial owners of UPS stock, which was held by defendant Fidelity under the Trust.

30. When any of the plaintiffs acquired UPS stock, they were required to, and did, accept the terms of the Trust Agreement.

31. Louis Goldberg obtained all of his stock pursuant to the Plan through awards to him when he was an employee of the Company, through stock splits and stock dividends, and through purchases as a member of the Plan, the last of which was made on June 5, 1973. The other plaintiffs received their stock by gifts of stock originally acquired by Louis Goldberg, and through stock splits and

stock dividends.

32. Under the terms of the Trust Agreement, to which Louis Goldberg and members of his family were subject, the Company had the option, commencing on or after June 15, 1979, to repurchase the 65,358 shares held by Louis Goldberg at his retirement, over a thirteen year period in 10% annual installments, or about 6,536 shares per year. Because a thirteen-year period is provided for, UPS has the additional option to defer its repurchase of any annual installment until any subsequent exercise date.

33. In April 1983, UPS notified Louis Goldberg and his family of its intention to exercise its next purchase option, on or after June 15, 1983, on a number of shares equal to their regular

annual installment, adjusted for the November 1982 four-for-one stock split, which amounted to 26,144 shares.

34. A representative for Louis Goldberg responded to the April 1983 notice from UPS by requesting that he be allowed to defer the sale of any UPS stock for the year 1983. The Company refused the request by letter on May 5, 1983. Further communications with representatives of Louis Goldberg ensued, in which UPS sought to have the Goldberg family designate the particular shares to be repurchased. These efforts were unsuccessful.

35. In the period between May 24, 1983, and August 24, 1983, UPS exercised its option and purchased approximately 2,171,000 shares from about 600 sharehold-

ers, other than members of the Goldberg family. The price paid by UPS upon exercise of its right to repurchase all of these shares was $11 per share, the price which the UPS Board of Directors had determined to be the fair market value of UPS stock at its quarterly meeting held in May 1983. This price, which had been promptly communicated to all shareholders, remained in effect until a new price was set at the next quarterly meeting of the Board in August 1983.

36. On August 24, 1983, UPS exercised its option with respect to the stock of Louis and Anne Goldberg and family at the $11 per share price set by the Board of Directors at its May 1983 quarterly meeting, and as a result, those shares were transferred to the account of

UPS by the Trustee.

37. The UPS Board of Directors was meeting later during the week that the option was finally exercised.

38. On August 26, 1983, the Board released its next quarterly announcement in which it reported its determination of a new, increased fair market value of UPS stock.

/s/ J. Robert Peterson
J. Robert Peterson

Sworn to and subscribed
before me this 30th day
of May, 1984.

/s/ Thomas H. Weidemeyer
Notary Public

THOMAS H. WEIDEMEYER
NOTARY PUBLIC
MY COMMISSION EXPIRES MARCH 31, 1985

APPENDIX F

ANSWERING AFFIDAVIT OF PETITIONERS IN OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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ANNE M. GOLDBERG, DANIEL GARNER, GERALD GARNER, DANIEL GARNER and HARVEY GARNER, as Trustees of G FAMILY TRUST #1, GERALD J. GARNER and HARVEY GARNER, as Trustees of G FAMILY TRUST #2, GERALD J. GARNER and DANIEL GARNER, as Trustees of G FAMILY TRUST #3, DANIEL GARNER and HARVEY GARNER, as Trustees of G FAMILY TRUST #11, GERALD J. GARNER and HARVEY GARNER, as Trustees of G FAMILY TRUST #12, LOUIS GOLDBERG and others similarly situated,

Plaintiffs,

v.

UNITED PARCEL SERVICE OF AMERICA, INC., FIDELITY UNION BANK, LARRY P. BREAKIRON, CHARLES R. BUCKRIDGE, WALTER E. DANIELEWSKI, CARL KAYSEN, GEORGE C. LAMB, JR., DONALD W. LAYDEN, GARY E. MacDOUGAL, KENT C. NELSON, PAUL OBERKOTTER, JOHN W. ROGERS, GEORGE P. WILLIAMS, III,

Defendants.

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84 Civ. 1076 (TCP)

ANSWERING AFFIDAVIT OF
PLAINTIFFS IN OPPOSITION
TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

STATE OF NEW YORK:COUNTY OF NASSAU ss:

ANNE M. GOLDBERG and LOUIS GOLDBERG being duly sworn depose and say:

We are two of the plaintiffs in the above entitled action and we make this affidavit in opposition to the defendants' motion for summary judgment.

Louis Goldberg began his employment with the defendant, UPS, approximately 50 years prior to his retirement on July 24, 1978. He worked himself up from an initial employee to a division manager. Prior to 1958 shares were awarded to Louis Goldberg and to other employ-

ees and there was no restrictions on those shares. In fact, prior to 1958, Louis Goldberg had entered into a transaction wherein a certain number of his shares were purchased from one, McWerter, an employee of UPS, for an agreed purchase price. When this transaction came to the attention of the defendant, UPS, his supervisors, Irving Brown and Ernest Rodenbaugh scolded him and indicated that it should not be done again. They indicated to him that it was against company policy to do that because everything had to be offered back to the company.

This fact is in keeping with the contentions of all the plaintiffs in this action, viz, that prior to 1958 the provisions of the Certificate of Incorporation controlled share ownership in the

defendant, UPS in that, the stock had to be offered back to the defendant UPS, before its sale to a transferee. The defendant, UPS, pursuant to its Certificate of Incorporation, possessed the right of first refusal in connection with such shares. In fact, prior to 1958, shares were freely traded with the exercise of the right of first refusal on the part of defendant, UPS. In those years the defendant, UPS was not in the excellent financial position it finds itself in today and therefore it declined to buy such shares from various employees who were selling them.

These facts are easily corroborated by the stock transfer ledgers and other records of the defendant, UPS prior to 1958 which can be obtained pursuant to

a deposition and F.R.Civ.P. 34. The entire discovery process in this case can disclose the records of the defendant, UPS, and they would aid the plaintiffs in proving that, prior to 1958, there were no restrictions and that after 1958 the invalid restriction of the Trust Agreement arose.

Furthermore, there are no shareholder consents or a vote of shareholders concerning this Trust Agreement which varies and alters the rights of the parties under the Certificate of Incorporation. Certainly, the records of the defendant, UPS would show that there was no vote of shareholders concerning the Trust Agreement.

Furthermore, in the period of 1950 to 1960 and prior thereto, there was

a special class of stock for management hierachy, known as "Parmac" which was a further inducement to retain the shares with defendant, UPS. The plaintiffs never acquired shares. At some time since then, Parmac shares were converted back to common stock of UPS at a premium price. These facts are somewhat hazy for the reason that all of them are not within the knowledge of the deponents. The records of the defendant, UPS, would substantiate and enlighten the plaintiffs and this Court concerning the issuance of that stock as it bears upon the issues in this action.

Finally it is submitted, that there has been a discriminatory application of the policy of the defendant, UPS in that, the stock of its founder, Mr.

Casey, never had to be sold and was always retained by either a trust or foundation created by him. Again, the facts are not fully within the knowledge of the plaintiffs, however, it is something to inquire during pre-trial discovery since it corroborates the pattern of deception on the part of the defendant, UPS.

There are material issues of fact as appears from the statement of plaintiffs under Rule 3(g) of the Civil Rules of this Court. Summary Judgment should not lie in this case for the reason that the issues of fact such as, whether the Trust Agreement is valid and whether there was fraud and deception practiced by the defendant, UPS upon the plaintiffs and all others similarly situated must be developed during the pre-trial process of

this lawsuit.

We respectfully submit that there are material questions of fact inherent in the 12(2) and 17(a) allegations of the amended complaint. The applicability of the statute of limitations to these claims is one of such issues. Whether we could have or should have discovered the fraud of the defendant, UPS, in using the Trust Agreement to control the plaintiffs and others similarly situated is a prime issue of fact for resolution at trial.

Plaintiffs respectfully request that the motion for summary judgment be denied in their entirety.

WHEREFORE, it is respectfully requested that the relief requested by Anne M. Goldberg and Louis Goldberg be

granted.

/s/ Louis Goldberg
Louis Goldberg

/s/ Anne M. Goldberg
Anne M. Goldberg

SWORN to before me this
15 day of August, 1984

/s/ Leonard Kreinces

LEONARD KREINCES
Notary Public, State of New York
No. 30-7364365
Qualified in Nassau County
Commission Expires March 30, 1986

APPENDIX G

UPS MANAGERS STOCK TRUST
TRUST DEPOSIT AGREEMENT (AS AMENDED)

UPS MANAGERS STOCK TRUST

TRUST DEPOSIT AGREEMENT (AS AMENDED)

TO: Fidelity Union Trust Company, Trustee
765 Broad Street
Newark, New Jersey 07101

The undersigned is (are) this day causing to be deposited with you 74 shares of the Capital stock of United Parcel Service of America, Inc., to be held in trust by you for the undersigned under the UPS Managers Stock Trust, which is reproduced in full on the reverse side thereof.

The cost of this stock for Federal income tax purposes is $_____.

The Company employee whose term of employment shall govern the time periods

under the trust is Louis Goldberg.

I (we) have read the trust agreement provided on the reverse side hereof and agree to the terms of the same.

Date _____ /s/ Daniel Garner
Signature of Owner

_____
Signature of Co-owner, if any

APPENDIX H

UPS MANAGERS STOCK TRUST
TRUST DEPOSIT AGREEMENT
EXECUTED WITHOUT DATE
BY LOUIS GOLDBERG

UPS MANAGERS STOCK TRUST

TRUST DEPOSIT AGREEMENT (AS AMENDED)

Fidelity Union Trust Company, Trustee
765 Broad Street
Newark, New Jersey 07101

The undersigned is this day causing to be deposited with you _____ shares of the capital stock of United Parcel Service of America, Inc., to be held in trust by you for the undersigned under the UPS Managers Stock Trust, which is reproduced in full on the reverse side hereof.

The cost of this stock for Federal income tax purposes is $_____.

The Company employee whose term of

employment shall govern the time periods under the trust is LOUIS GOLDBERG.

I have read the trust agreement provided on the reverse side hereof and agree to its terms.

LOUIS GOLDBERG

_____	/s/ Louis Goldberg
Date	Signature of Owner
	_____
	Signature of Co-owner, if any

APPENDIX I

STATUTES AND RULES INVOLVED IN CASE

General Corporation Law of the State of Delaware:

§202. Restriction on transfer of securities.

* * *

(b) A restriction on the transfer or registration of transfer of securities of a corporation may be imposed either by the certificate of incorporation or by the bylaws or by an agreement among any number of security holders or among such holders and the corporation. No restriction so imposed shall be binding with respect to securities issued prior to the adoption of the restriction unless the holders of the securities are parties to an agreement or voted in favor of the

restriction.

* * *

Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. §78j, provides in relevent part:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

* * *

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appro-

priate in the public interest or for the protection of investors."

Rule 10b-5, 17 CFR §240.10b-5 (1976), provides:

"Employment of manipulative and deceptive devices.

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which

they were made, not misleading, or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

"in connection with the purchase or sale of any security."